

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

Johnnie M. DuBose,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07-045(***)
	)	
Michael Walsh, American Business Credit,	)	
Robert K. Beste, Jr. and Maggie Clausell,	)	
Defendants.	)	

**OPENING BRIEF OF DEFENDANTS MICHAEL WALSH  
AND THE NEW CASTLE COUNTY SHERIFF**

HEIMAN, GOUGE & KAUFMAN, LLP

/s/ Donald L. Gouge, Jr. #2234

Donald L. Gouge, Jr. (DSB # 2234)

800 King Street, Suite 303

P.O. Box 1674

Wilmington, DE 19801

(302) 658-1800

(302) 658-1473 (fax)

dgouge@hgkde.com

Date: March 5, 2007

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES	ii
I. Nature and stage of the Proceedings	1
II. Summary of Argument	1
III. Statement of Facts	1
IV. Argument	2
V. Conclusion	4

**TABLE OF AUTHORITIES**

**CASES**

<i>Burge v. Fidelity Bond and Mortgage Company</i> , 648 A.2d 414 (Del. 1994)	1
<i>Cedar Inn v. King's Inn, Inc.</i> , 269 A. 2d 781 (Del.Super. 1970)	2
<i>Steward v. Meeker</i> , 459 D.2d 669 (3d Cir 1972)	4

**STATUTES, RULES**

10 Del.C. §4985	2
42 U.S.C. §1983	3, 4
42 U.S.C. §1985	3, 4
42 U.S.C. §1986	4
Fed. R. Civ. P. 12(b)(1)	2, 4
Fed. R. Civ. P. 12(b)(6)	4

I. **NATURE AND STAGE OF PROCEEDINGS**

The Sheriff defendants (Michael Walsh and the New Castle County Sheriff) adopt the nature and stage of the proceedings set forth in the co-defendants' motions to dismiss and supporting briefs and incorporate by reference all grounds alleged in their Motions as if fully set forth herein.

The Sheriff defendants have moved to dismiss this action, for Plaintiff's failure to state a claim upon which relief can be granted, and for Plaintiff's failure to state a claim within the jurisdiction of this Court.

II. **SUMMARY OF ARGUMENT**

See above.

III. **STATEMENT OF FACTS**

The Sheriff defendants adopt and incorporate the statement of facts presented by the co-defendants.

The plaintiff alleges that the Sheriff delivered a defective deed (complaint, #33); converted rental income (complaint, #37); and retained the proceeds of the judicial sale (complaint, #40).

As a means of background, the Sheriff is nothing more than a judicial conduit to sell real estate at monthly auctions. The foreclosure sales are held once the Delaware Superior Court has entered a judgment pursuant to a complaint and the appropriate writs are filed to sell a parcel of real estate. At any time before the sale or prior to confirmation after the sale (confirmation takes place the first Friday after the first Monday the month following the sale) a motion to stay (before the sale) or set aside a sale (after a sale) may be filed. A review of a Sheriff's sale are generally filed in and decided by the Delaware Superior Court. *Burge v. Fidelity Bond and*

*Mortgage Company*, 648 A.2d 414 (Del. 1994). DuBose filed a motion to set aside the November 13, 2006 sale of 727 Bennett Street but never presented the motion. The disbursement of sale proceeds are governed by Statute, 10 *Del.C.* §4985; *Cedar Inn v. King's Inn, Inc.*, 269 A.2d 781 (Del.Super. 1970). At no time does the Sheriff take possession of a parcel of real estate before, during or after a sale and therefore collects no funds (e.g. rent). The only funds collected by the Sheriff result from actual purchases of real estate as part of the sale process. All monies collected by the Sheriff from successful bidders are accounted for in a cost sheet. The disbursement ledger for the two sales in issue are attached.

### III. **LEGAL ARGUMENTS**

#### **A. STANDARD OF REVIEW**

The Sheriff adopts the standard of review set forth in the co-defendants' briefs.

#### **B. PLAINTIFF FAILS TO PROPERLY ALLEGE VIOLATIONS OF 42 U.S.C. §§1983, 1985, OR 1986, AS TO THE SHERIFF DEFENDANTS AND, THEREFORE THE COURT DOES NOT HAVE JURISDICTION OVER THIS MATTER.**

The Sheriff defendants move to dismiss the allegations against them under Fed. R. Civ. P. 12(b)(1), in that the claims are devoid of any merit, and does not involve any issue subject to the jurisdiction of this Court. The Sheriff adopts and incorporates the arguments contained in the co-defendants' briefs.

#### **C. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER 42 U.S.C. §1983**

Aside from the merits of Plaintiff's failure to understand the foreclosure process, it is apparent the allegations he makes as to the Sheriff defendants are clearly insufficient to state any cause of action.

Paragraph 33 of the Complaint states merely that Plaintiff was provided a defective deed without stating how or why. After a sale has been confirmed by the Delaware Superior Court, a deed is executed by the Sheriff in one of two ways. First, the deed is prepared and presented by the successful bidder. Second is that the Sheriff will prepare the deed at the instruction and expense of the successful bidder. The Sheriff has no legal obligation to independently research title to the property. The real estate sales are buyer beware, so it is incumbent upon a successful bidder to know what he is buying at a sale. It is unknown how or why the Sheriff purportedly delivered a "defective title" to the Plaintiff.

The "Second Cause of Action," as set forth in Section VI of the Complaint, appears to allege that the Sheriff collected rental income from the property. As stated above, the Sheriff never takes possession of a property before, during or after a sale and therefore does not collect rent. The only contact that the Sheriff or his agents have with an occupant of a property is to post notice(s) of the sale and removal of the occupants once the Delaware Superior Court has issued a writ of possession, which is several months after the sale date. At best, this mere summary allegation does not state a federal cause of action, and should be dismissed.

The "Third Cause of Action," seems to allege that the Sheriff improperly disbursed the proceeds of the sale. The proceeds were disbursed consistent with State law and Delaware state case law. The conclusory allegation does not support a federal cause of action.

**D. NO CONSPIRACY IS ALLEGED, AS REQUIRED BY §1985.**

It is not quite clear what specific subsection of §1985 Plaintiff asserts was violated. However, each subsection of §1985 requires a specific type of conspiracy. Plaintiff's Complaint makes no allegation that any party conspired with any other party. Section 1985 requires

allegations of a conspiracy; and, in the absence of such, the Complaint should be dismissed. Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972). As with Section 1983, Section 1985 also requires state action or state involvement, and vague allegations of defective title, collection of rents and conversion do not support a Section 1985 action.

**E. THE COMPLAINT DOES NOT STATE A CLAIM UNDER §1986.**

42 U.S.C. §1986 refers to failure to act upon wrongs conspired to be done, as set forth in §1985. There is no allegation of any conspiracy, and there is no allegation of neglect or failure to prevent any action, and therefore this action must be dismissed.

**IV. CONCLUSION**

It is respectfully submitted that, based upon the foregoing reasons and authority: [1] the Complaint fails to properly allege a violation of federal law, under 42 U.S.C. §§1983, 1985, 1986 or 1988, or other federal law, and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1); and [2] the Complaint fails to state a claim upon which relief can be granted, and should be therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

HEIMAN, GOUGE & KAUFMAN, LLP

/s/ Donald L. Gouge, Jr. #2234

Donald L. Gouge, Jr. (DSB # 2234)

800 King Street, Suite 303

P.O. Box 1674

Wilmington, DE 19801

(302) 658-1800

(302) 658-1473 (fax)

[dgouge@hgkde.com](mailto:dgouge@hgkde.com)

Date: March 5, 2007

# Exhibit 1



SALE DATE	11/14/06
ATTORNEY	AMERICAN BUSINESS CREDIT INC
PLAINTIFF	09/11/06
TESTE DATE	03L-12-078
CIVIL ACTION NUMBER	2ND PLRS LEV FAC
WRIT	#
#	4
SEAD06	SEAD06
DEFENDANT	BEY, CLIVE E AKA NEVILLE D HEMLEY
ADDRESS	727 BENNETT STREET
CITY	WILMINGTON
ZIP CODE	19801
PARCEL	26-044.10-169
TYPE	1
OUTCOME	BUYBACK
OUTCOME1	BUY BACK
NOTES	DEEDED TO JPMORGAN CHASE BANK, N.A., ...1/12/07 ; DEED PREP 1/17/07, R#30557; MOTION TO SET ASIDE DENIED 12/16/06 - DEED PREP CHARGED TO FEES -
UPSET BID	\$51,000.00
ASSETS	\$5,484.93
LIABILITIES	\$5,484.93
PAID?	PAID
BALANCE/EXCESS	\$0.00
STAY COSTS DETAIL	
HANDBILLS	\$110.00
HANDBILLS, CK#, DATE	FARLEY PRINTING, CK#2108, 10/31/06
NEWS JOURNAL	\$400.02
NEWS JOURNAL, CK#, DATE	NEWS JOURNAL:CK#2161:12/14/06
NEW CASTLE WEEKLY	\$50.00
NEW CASTLE WEEKLY, CK#, DATE	NEW CASTLE WEEKLY:CK#2162:12/14/06
NEWARK POST	\$0.00
NEWARK POST, CK#, DATE	
MIDDLETOWN TRANSCRIPT	\$0.00
MIDDLETOWN TRANSCRIPT, CK#, DATE	
SHERIFF PREP COSTS	\$25.00
SHERIFF PREP COSTS, R#, CK#, DATE	
TOTAL STAY COSTS	\$585.02
OTHER COSTS DETAIL	
CERT. AND ACK.	\$7.50
CERT. & ACK, R#, CK#, DATE	
AUCTIONEER	\$30.00
AUCTIONEER, CK#, DATE	153, 11/15/06
TOTAL SALE COSTS	\$37.50
TAXES AND UTILITIES DETAIL	
NCC TAX	\$790.41
NCC TAX, CK#, DATE	2229, 1/23/07
NCC SEWER	\$0.00
NCC SEWER, CK#, DATE	
NCC ATTORNEY FEE	VERIFIED PER HANSON 1/23/07
NCC ATTY FEE, CK#, DATE	\$0.00
WILM. TAX	\$581.87
WILM. TAX, CK#, DATE	CITY OF WILMINGTON, CK#2231, 1/23/07
WILM. WATER	\$1,910.13
WILM. WATER ACCOUNT NUMBER	#14617 '47330
WILM. WATER, CK#, DATE	CITY OF WILMINGTON, CK#2231, 1/23/07
L & I LIENS	\$0.00
L & I LIENS ACCT. #	
L&I LIENS, CK#, DATE	
WILM. ATTY FEE	
WILM. ATTY FEE, CK#, DATE	\$0.00
TOWN OF ELSMERE FEES	\$0.00
TOWN OF ELSMERE, CK#, DATE	
NEWARK FEES	\$0.00
NEWARK FEES, CK#, DATE	
ELSMERE FEES	\$0.00
ELSMERE CK#, DATE	
TOTAL TAXES AND UTILITIES (T&U)	\$3,282.41
TOTAL SALE COSTS PLUS TAXES AND UTILITIES	\$3,804.93
DEBT DETAIL	
PRINCIPAL	\$155,450.29
INTEREST	\$125,327.76
INTEREST UNTIL CONFIRMATION	\$0.00
DEPOSIT	\$500.00
LATE	\$5,764.20
ESCROW	\$0.00
COSTS	\$0.00
MISC	\$44,151.85
DEBT TOTAL	\$331,194.10
COUNSEL FEE	\$27,000.00
DEBT PLUS COUNSEL FEE	\$358,194.10
SHERIFF 3% (\$500 MIN)	\$1,530.00
SHERIFF 3%, R#, CK#, DATE	NEW CASTLE COUNTY, CK#2232, R#50536, 1/24/07
TRANSFER TAX1	\$0.00
TRANSFER TAX1, CK#, DATE	\$0.00 N/A
TRANSFER TAX2	\$0.00
TRANSFER TAX2, CK#, DATE	\$0.00 N/A
RECEIPTS	\$500.00
ATTORNEY DEPOSIT	ATTORNEY DEPOSIT, R#, DATE
RECEIPT1 AMOUNT	\$4,984.93
RECEIPT1, R#, DATE	OCWEN LOAN SERVICING LLC:R#30533:12/15/06
RECEIPT2 AMOUNT	\$0.00
RECEIPT2, R#, DATE	
RECEIPT3 AMOUNT	\$0.00
RECEIPT3, R#, DATE	
TOTAL RECEIPTS	\$5,484.93
DISBURSEMENTS	\$50.00
DISBURSEMENT1 AMOUNT	TO PAY FOR DEED PREP+ R#30557, 1/17/07
DISBURSEMENT1, CK#, DATE	\$0.00
DISBURSEMENTS2 AMOUNT	\$0.00
DISBURSEMENTS2, CK#, DATE	
DISBURSEMENTS3 AMOUNT	\$0.00
DISBURSEMENTS3, CK#, DATE	
TOTAL DISBURSEMENTS	\$50.00

SALE DATE	05/09/06
ATTORNEY	BESTE, R.
PLAINTIFF	AMERICAN BUSINESS CREDIT INC
TESTE DATE	03/16/06
CIVIL ACTION NUMBER	03L-12-078
WRIT	1ST PLRS LEV FAC
#	85
MR AD 08	MR AD 06
DEFENDANT	DUBOSE, JOHNNIE
ADDRESS	727 BENNETT STREET
CITY	WILMINGTON
ZIP CODE	19801
PARCEL	26-044.10-169
TYPE	0
OUTCOME	STAYED
OUTCOME1	STAYED PER FAX 5/9/06
NOTES	
UPSET BID	\$217,000.00
ASSETS	\$500.00
LIABILITIES	\$588.56
PAID?	NOT PAID
BALANCE/EXCESS	(\$588.56)
STAY COSTS DETAIL	
HANDBILLS	\$110.00
HANDBILLS, CK#, DATE	FARLEY PRINTING, CK#1741, 5/22/06
NEWS JOURNAL	\$403.56
NEWS JOURNAL, CK#, DATE	NEWS JOURNAL:CK#1777:6/5/06
NEW CASTLE WEEKLY	\$50.00
NEW CASTLE WEEKLY, CK#, DATE	NEW CASTLE WEEKLY:CK#1778:6/5/06
NEWARK POST	\$0.00
NEWARK POST, CK#, DATE	
MIDDLETOWN TRANSCRIPT	\$0.00
MIDDLETOWN TRANSCRIPT, CK#, DATE	
SHERIFF PREP COSTS	\$25.00
SHERIFF PREP COSTS, CK#, DATE	
TOTAL STAY COSTS	\$588.56
OTHER COSTS DETAIL	
CERT. AND ACK.	\$0.00 N/A
CERT AND ACK, CK#, DATE	\$0.00 N/A
AUCTIONEER	\$0.00 N/A
AUCTIONEER CK#, DATE	\$0.00 N/A
DEPOSIT LESS STAY/OTHER COSTS	\$0.00
TAXES AND UTILITIES DETAIL	
NCC TAX	\$0.00 N/A
NCC TAX, CK#, DATE	\$0.00 N/A
NCC SEWER	\$0.00 N/A
NCC SEWER, CK#, DATE	\$0.00 N/A
WLM TAX	\$0.00 N/A
WLM TAX, CK#, DATE	\$0.00 N/A
WLM. WATER AND SEWER	\$0.00 N/A
WLM. WATER ACCOUNT NUMBER	\$0.00 N/A
WLM. WATER, CK#, DATE	\$0.00 N/A
L & I LIENS	\$0.00 N/A
L & I LIENS ACCT. #	\$0.00 N/A
WLM. L&I, CK#, DATE	\$0.00 N/A
MIDDLETOWN FEES	\$0.00 N/A
MIDDLETOWN FEES, CK#, DATE	\$0.00 N/A
NEWARK FEES	\$0.00 N/A
NEWARK FEES, CK#, DATE	\$0.00 N/A
NEW CASTLE FEES	\$0.00 N/A
NEW CASTLE FEES, CK#, DATE	\$0.00 N/A
MONITION FEE	\$0.00 N/A
MONITION FEES, CK#, DATE	\$0.00 N/A
ATTORNEY FEE	\$0.00 N/A
ATTORNEY FEE, CK#, DATE	\$0.00 N/A
TOTAL TAXES AND UTILITIES (T&U)	\$0.00
DEPOSIT LESS COSTS AND T&U	\$0.00
DEBT DETAIL	
PRINCIPAL	\$155,450.29
INTEREST	\$103,958.20
INTEREST UNTIL CONFIRMATION	\$0.00
DEPOSIT	\$500.00
LATE	\$5,784.20
ESCROW	\$0.00
COSTS	\$0.00
MISC	\$44,151.85
DEBT TOTAL	\$309,224.54
COUNSEL FEE	\$12,940.42
DEBT PLUS COUNSEL FEE	\$322,164.96
SHERIFF'S FEE (3% HIGH BID) \$500 MINIMUM	\$0.00 N/A
SHERIFF 3%, R#, CK#, DATE	\$0.00 N/A
TRANSFER TAX1 AMOUNT	\$0.00 N/A
TRANSFER TAX1, CK#, DATE	\$0.00 N/A
TRANSFER TAX2	\$0.00 N/A
TRANSFER TAX2, CK#, DATE	\$0.00 N/A
DUE TO SHERIFF NO LATER THAN FIRST MONDAY OF MONTH AFTER SALE	#VALUE!
RECEIPTS	\$500.00
DEPOSIT AMOUNT	
DEPOSIT, R#, DATE	ATTORNEY DEPOSIT, R# 30082, 5/11/06
RECEIPT1 AMOUNT	\$0.00
RECEIPT1, R#, DATE	
RECEIPT2 AMOUNT	\$0.00
RECEIPT2, R#, DATE	
RECEIPT3 AMOUNT	\$0.00
RECEIPT3, R#, DATE	
RECEIPT4, R#, DATE	\$0.00
RECEIPT4, R#, DATE	
TOTAL RECEIPTS	\$500.00
DISBURSEMENTS	\$0.00
DISBURSEMENTS1 AMOUNT	
DISBURSEMENTS1, CK#, DATE	
DISBURSEMENTS2 AMOUNT	\$0.00
DISBURSEMENTS2, CK#, DATE	
DISBURSEMENTS3 AMOUNT	\$0.00
DISBURSEMENTS3, CK#, DATE	
TOTAL DISBURSEMENTS	\$0.00

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

Johnnie M. DuBose,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07-045(***)
	)	
Michael Walsh, American Business Credit,	)	
Robert K. Beste, Jr. and Maggie Clausell,	)	
Defendants.	)	

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the date listed below that the attached brief in support of Michael Walsh to dismiss him and the NCC Sheriff was served as indicated below.

Johnnie M. DuBose (U.S. Mail)  
4 Teakwood Lane  
Wilmington, DE 19801

Robert K. Beste, Jr., Esquire (By Hand & Electronically)  
1007 N. Orange Street, Suite 1130  
Wilmington, DE 19801

Paul Cottrell, Esquire (By Hand & Electronically)  
704 King Street, Suite 500  
Wilmington, DE 19801

HEIMAN, GOUGE & KAUFMAN, LLP

/s/ Donald L. Gouge, Jr. #2234  
Donald L. Gouge, Jr. (DSB # 2234)  
800 King Street, Suite 303  
P.O. Box 1674  
Wilmington, DE 19801  
(302) 658-1800  
(302) 658-1473 (fax)  
[dgouge@hgkde.com](mailto:dgouge@hgkde.com)

Date: March 5, 2007